Supreme Court, U.S.
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No. 06-844

In the Supreme Court of the United States

COL. JEFFREY B. MILLER, IN HIS OFFICIAL CAPACITY AS COMMISSIONER, PENNSYLVANIA STATE POLICE,

Petitioner

v.

CONCHATTA, INC., T/D/B/A CLUB RISQUE ON THE DELAWARE; GAIL BAKER; SABRINA BARRAR,

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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ARGUMENT

Respondents say that this is a "straightforward" case that was resolved below by a "straightforward" application of well-established principles. Br. in Opp., at 1, 14. But even a cursory reading of the Court of Appeals' decision – its insistence on the need for a "narrowing construction" of the critical statutory term while ignoring the caselaw that provides it; its curious focus on the number of *establishments* subject to the challenged provisions rather than on the amount of protected *expression* that might be prohibited; its jumbling together of two separate lines of caselaw while correctly applying neither – reveals that this decision is anything but "straightforward." Rather, this confused and convoluted decision exemplifies the need for guidance from the Court.

I. The Lower Courts Need Guidance On The Proper Approach To First Amendment Cases That Deal With The Regulation Of Adult Entertainment, Especially Those Involving Alcohol.

A. Another case, similar to this one, is headed for this court.

Petitioner seeks review of an issue that, in one form or another, has arisen repeatedly in the lower courts, and will continue to do so. On December 15, 2006, the day after petitioner filed his petition in this case, the Fourth Circuit issued its second decision in the *Carandola* case, *Giovani Carandola, Ltd. v. Fox*, 470 F.3d 1074 (2006). This development reinforces everything petitioner said in his petition about the lower courts' acute need for guidance on the correct analytical approach to cases like this.

In "*Carandola II*," the Fourth Circuit rejected liquor licensees' U.S. CONST., Amend. I First Amendment challenges to certain provisions in the North Carolina liquor code, finding them neither vague, *id.*, at 1079-81, nor overbroad, *id.*, at 1081-85. Although petitioner has no problem with the ultimate result in *Carandola II*, he does question the mode of analysis the court utilized to arrive at that result. As was also true in *Carandola I*, the Fourth Circuit – like the Third in this case – imported the *O'Brien* intermediate scrutiny elements into its overbreadth analysis. *Carandola II*, 470 F.3d at 1082-83; *Giovani Carandola Ltd. v. Bason*, 303 F.3d 507, 512-20 (4th Cir. 2002). This is just as illogical and inappropriate now as it was a few months ago, when the Third Circuit decided this case, or even four years ago, when *Carandola I* came down.

As further discussed below, respondents downplay this problem, but their counterparts in the Fourth Circuit (who happen to be represented by the same attorney as respondents) take a different view. They have filed a motion to stay the issuance of the mandate in *Carandola II*, pending the filing of a petition for a writ of certiorari in this court.[1] In their motion, the *Carandola* licensees say that "[a]mong the questions that will be presented to the Supreme Court in this case are overbreadth ... and the mode of analyzing such claims." (Addendum, at 3.) In a sentence that could have been taken from the petition in this case, they explain: "Overbreadth challenges are frequently brought against statutes and ordinances such as the one at issue here that seek to restrict sexual expression, and the decisions of the courts of appeals vary in their analyses and their outcomes." (*See* Addendum, at 6.)

In other words, it looks like the Court will soon receive another petition for certiorari, raising an issue

[1] A copy of that motion is appended to this brief.

similar to the one petitioner has raised and requesting resolution of that issue for similar reasons (albeit from the perspective of liquor licensees rather than the government).

B. Respondents fail to account for the uncertainty generated by this court's existing adult entertainment and alcohol-related decisions, and fail to appreciate the differences between *Broadrick* and *O'Brien*.

Three discrete strands of First Amendment caselaw may come into play in adjudicating a case of this nature: cases arising specifically in the context of liquor regulation, such as *California v. LaRue*, 409 U.S. 109 (1972); those dealing more generally with adult entertainment and its potential secondary effects, such as *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), and *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000); and those addressing facial overbreadth challenges in any number of contexts, such as *Broadrick v. Oklahoma*, 413 U.S. 601 (1973).

In their brief, respondents touch upon *Broadrick*, but they do not even mention *LaRue*, *Barnes*, or *Pap's*, or any of the related, subsequent decisions of this court that the courts of appeals have been struggling to comprehend and apply. Ignoring the applicable legal background will not make it disappear. Part of why this case warrants review on certiorari is that, especially in light of the splintered First Amendment decisions emanating from this court, the lower courts are unsure what analytical approach to take in cases such as this.

Barnes and *Pap's* are descendants of *United States v. O'Brien*, 391 U.S. 367 (1968), which respondents do mention. One of petitioner's main concerns, of course, is the Court of Appeals' unjustified importation of *O'Brien* into its *Broadrick* overbreadth analysis. On this point, respondents accuse petitioner of "champion[ing]

a distinction without a difference" (Br. in Opp., at 16). They seem to believe that the *O'Brien* and *Broadrick* lines of authority are somehow "parallel" and interchangeable, so it does not matter which path a court follows in analyzing a facial overbreadth claim. They are incorrect.

O'Brien and *Broadrick* represent two different approaches to two different types of claim. *See City of Erie v. Pap's A.M.*, 529 U.S. at 317 n.6 (Souter, J., concurring in part). Which approach is, or should be, invoked in analyzing a particular case has practical consequences. Because an unconstitutional law may chill the exercise of First Amendment rights, the usual standing requirements are relaxed for a party seeking to pursue a facial overbreadth challenge under *Broadrick*. *Id.*, 413 U.S. at 612. On the other hand, to press a First Amendment claim based on *O'Brien* and its progeny, plaintiffs do not receive any "break" on standing. Furthermore, while a party undertaking a *Broadrick* facial overbreadth challenge must "demonstrat[e] 'from the text of [the law] and from actual fact,' that *substantial* overbreadth exists," *Virginia v. Hicks*, 539 U.S. 113, 122 (2003) (*quoting New York State Club Assn., Inc. v. City of New York*, 487 U.S. 1, 14 (1988)) (emphasis added), this is accomplished, if at all, without the "factual development that is a prerequisite to *O'Brien* analysis." *Pap's A.M.*, 529 U.S. at 317 n.6 (Souter, J., concurring in part). In the adult-entertainment arena, at least, *O'Brien*-style factual development may entail exploration of the purpose behind a challenged law or ordinance, what information lawmakers or governmental officials relied on in adopting the law, and how the law has been or will be implemented. *E.g.*, *Pap's A.M.*, 529 U.S. at 296-98.

II. Respondents Have Not Justified The Court Of Appeals' Incorrect Overbreadth Decision And Cannot Do So.

This court has observed, "The concept of 'substantial overbreadth' is not readily reduced to an exact definition. It is clear, however, that the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." *Members of the City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984). In the absence of evidence that *any* Pennsylvania liquor licensee actually presents, or seeks to present, "ordinary theater or ballet performances, concerts, or similar forms of entertainment" (Pet. App. 20a) which would be "lewd" within the common understanding of that term – let alone that the amount of such entertainment is "substantial" – the Court of Appeals did nothing more than "conceive of some impermissible applications" of Pa. Stat. Ann., tit. 47, § 4-493(10). That was not and is not sufficient.

Respondents continue to stress that § 4-493(10) applies, without limitation, to "every establishment in Pennsylvania where alcohol may lawfully be served" (Br. in Opp., at 1. *See also Id.*, at i, 12). So do almost all other restrictions on licensees. *See generally* § 4-493. But that is not the point. The statutory language embodies a crucial limitation on its potential applications: Only "lewd" entertainment is forbidden.

Despite what respondents say (Br. in Opp., at 11 & n.7), the Pennsylvania courts have not "equated lewdness with simple nudity." *Commonwealth v. J.P.W.G., Inc.*, 489 A.2d 992, 995 (Pa. Cmwlth. 1985), quoted by respondents, involved topless "go-go" dancers in a bar (where patrons also gambled), *id.*, at 993, not ballerinas at the Kimmel Center for the Performing Arts. The case cannot fairly be cited, as respondents do, for the bald proposition that nudity is lewd by definition, no matter what the context or setting.

In the same way, respondents – who pay no attention at all to the actual administrative enforcement history of § 4-493(10) – point to a 2001 advisory opinion in which (as they put it) "the Liquor Control Commission [sic] warned one tavern owner that the display of bare-breasted women on video terminals would violate the statute." (Br. in Opp., at 10.) What that opinion actually says is that video images are subject to the same guidelines as live performances. Thus, showing an X-rated movie on TV in a bar might expose a licensee to citation,[2] but allowing bar patrons to watch a broadcast of a film such as "Hair" or "Equus" would not.

* * * * *

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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[2] *See, e.g., Pennsylvania Liquor Control Board v. Harman*, 49 Pa. D.& C.3d 474 (Dauphin Co. 1986), *aff'd*, 543 A.2d 616 (Pa. Cmwlth. 1988) (upholding license suspension imposed for showing lewd film on television in liquor-licensed establishment).

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Date: January 26, 2007

ADDENDUM

No. 05-2308

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

GIOVANI CARANDOLA, LTD.,
A North Carolina Corporation, et al.,
Plaintiffs-Appellees,

v.

DOUGLAS A. FOX, in his official
Capacity as acting Chair of the North
Carolina Alcohol Beverage Control
Commission, et al.,
Defendants-Appellants

* * *

No. 06-1040

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

GIOVANI CARANDOLA, LTD.,
A North Carolina Corporation, et al.,
Plaintiffs-Appellants,

v.

DOUGLAS FOX, et al.
Defendants-Appellees

On Appeal from the United States District Court
For the Middle District of North Carolina
Greensboro Division

MOTION OF PLAINTIFFS-APPELLEES/CROSS-APPELLANTS TO STAY THE ISSUANCE OF THE MANDATE PENDING THE FILING OF A PETITION FOR A WRIT OF CERTIORARI

Now come the Plaintiffs-Appellees/Cross-Appellants, by and through their counsel, and respectfully move the Court, pursuant to Fed. R. App. P. 41, for an order staying the issuance of the mandate, for a period not to exceed ninety days, pending their filing of a petition for a writ of certiorari with the United States Supreme Court. The grounds for this motion are that the case at bar presents substantial, non-frivolous questions of constitutional importance that the Supreme Court may well consider for review. Steven Shafron, one of movants' counsel, spoke with Christopher Browning, counsel for the opposing parties, who indicated they would not consent to the granting of the motion.

Rule 41(d)(2), Fed. R. App. P., permits the Court to stay the mandate pending the filing of a petition for a writ of certiorari to the Supreme Court, and provides, in relevant part:

> (A) A party may move to stay the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court. The motion must be served on all parties and must show that the certiorari petition would present a substantial question and that there is good cause for a stay.
>
> (B) The stay must not exceed 90 days, unless the period is extended for good cause or unless the party who obtained the stay files a petition for the writ and so notifies the circuit clerk in writing within the period of the stay. In that case, the stay continues until the Supreme Court's final disposition.

Id.

Among the questions that will be presented to the Supreme Court are overbreadth and vagueness and the mode of analyzing such claims.

The Supreme Court has never considered a claim of overbreadth in a case that involved the validity of a law regulating sexually oriented dance performances. *See Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 585 n.2 (1991) ("Because there is no overbreadth challenge before us, we are not called upon to decide whether the application of the statute would be valid in other contexts."); *City of Erie v. Pap's A.M.*, 529 U.S. 277, 317 n.6 (Souter, J., concurring). However, a number of courts of appeals have addressed overbreadth challenges to laws similar to the one at issue here and have come to different conclusions as to whether the laws at issue passed constitutional muster.

For example, in *Conchatta, Inc. v. Miller*, 458 F.3d 258 (3rd Cir. 2006), *petition for cert. pending*, No. 06-844 (12/14/06), the Third Circuit struck down as unconstitutionally overbroad a Pennsylvania statute that prohibited "lewd entertainment" in liquor permit premises, in the face of the State's assertion that it had no intention of enforcing it against legitimate theatrical performances.

Just weeks earlier, however, that same court sustained against an overbreadth challenge a Delaware law that prohibited "lewd and immoral activities" in liquor permit premises. *181 South v. Fisher*, 2006 WL 1984497 (3rd Cir. 2006) (7/18/06).

The Sixth Circuit, in *Odle v. Decatur County, Tenn.* 421 F.3d 386 (6th Cir. 2005), struck down as impermissibly overbroad a county law that prohibited nudity and the performance of a wide range of arguably sexually suggestive acts in public places where liquor

was served, noting, "This is why the Supreme Court has struck a delicate balance between, on the one hand, accepting a state or local government's plausible saving construction when an ordinance or statute is 'readily susceptible' to it, *American Booksellers*, 484 U.S. at 397, 108 S.Ct. 636, and, on the other hand, declining to accept a construction where to do so would amount to rewriting state or local law-an enterprise the federal courts are not empowered to undertake." *Id.* at 397.

Other courts of appeals, too, have resolved overbreadth challenges to a law governing expression in liquor permit premises, and have arrived at different conclusions. In *Schultz v. City of Cumberland*, 228 F.3d 831 (7th Cir. 2000), the court was only able to sustain the law at issue by construing the phrase "regularly feature [nudity]" in the definition of the businesses to which it was applicable, to mean "*always* feature nudity, semi-nudity and specified sexual content...." *Id.* at 851 (emphasis added).

In its opinion in the case at bar, the Court disagreed with the conclusion of the Eighth Circuit in *Farkas v. Miller*, 151 F.3d 900 (8th Cir. 1998), that an exception such as that contained in North Carolina's law "fully limits the reach of the restrictions to the type of adult entertainment that is associated with harmful secondary effects." Opinion at 15. Notwithstanding that disagreement, this Court sustained the law against an overbreadth challenge.

Overbreadth challenges are frequently brought against statutes and ordinances such as the one at issue here that seek to restrict sexual expression, and the decisions of the courts of appeals vary in their analyses and their outcomes. Because of the frequency with which these issues arise, the Supreme Court may well find this case an appropriate vehicle to consider the overbreadth of N.C.G.S. 18B-1005.1.

A second question presented by this case that the Supreme Court may consider for review is the vagueness issues of the terms employed by the ordinance. Though this Court found the term "fondle" to not be impermissibly vague, Opinion at 9, citing the Ninth Circuit's decision in *Kev, Inc. v. Kitsap County*, 793 F.2d 1053 (9th Cir. 1986), the *Kev* court only reached that conclusion by construing that term with other provisions in the law at issue, namely the definition of a dancer—one "who seeks to arouse or excite the patrons' sexual desires," and the requirement of proof the dancers intended to arouse sexually while acting in the scope of their employment. *Id.* at 1057. *See also Gammoh v. City of La Habra*, 395 F.3d 1114, 1120 (9th Cir. 2005).

And in sustaining the term "simulate" employed against a vagueness challenge, the Court necessarily had to place a gloss on its meaning and construe it to mean expressive activity that would "convey a realistic impression of an *actual* sexual act." Opinion at 9.

Because this Court and the lower court reached diametrically opposed conclusions as to the vagueness of these terms, a pure question of law, and because, like overbreadth issues, vagueness challenges are often raised in connection with laws seeking to restrict sexually oriented expression, the Supreme Court may well decide to address the question and decide for itself whether the terms "simulate" and "fondle," unadorned and unlimited by any other provision of the statute, are impermissibly vague.

These are weighty and substantial issues the Supreme Court has not yet addressed and may deem appropriate for review.

In addition to the presence of substantial and non-frivolous issues, good cause to stay the mandate is present, for as the Supreme Court has stated, as has

this Court, the loss of First Amendment rights for even a short period of time, results in irreparable injury. *See Elrod v. Burns*, 427 U.S. 347 (1976); *Carandola I*, 303 F.3d 507, 520-521. Were the Supreme Court ultimately to conclude that the challenged law violates the First and Fourteenth Amendments, serious harm, namely, government enforcement of an unconstitutional law will have already occurred.

By way of contrast, staying the mandate pending the filing of a petition for a writ of certiorari would do nothing more than preserve the *status quo*. Likewise, there is little likelihood of harm to the general public in the event a stay is issued.

For all of the foregoing reasons, Plaintiffs-Appellees/Cross-Appellants respectfully request that the Court grant their motion.

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